Office - Supreme Court, U.S.
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APR 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-867 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF OF PETITIONER CONSOLIDATED RAIL CORPORATION

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PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

13 pp

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In a brief for respondent United States, the Solicitor General has supported Conrail's petition and the petition of the Interstate Commerce Commission ("Commission") in No. 84-550, both seeking review of the same decision of the court of appeals. Most of the remaining respondents have opposed both petitions. In this reply brief, we address those oppositions.[1]

I. Joint Rates

The question presented in Conrail's petition is whether the court of appeals properly added to the enumerated

[1] "Jt. Opp." refers to the brief in opposition filed by most respondents; "Can. Opp." refers to the brief in opposition filed by the Canadian railroads. "U.S. Br." refers to the Solicitor General's brief.

elements of the National Transportation Policy ("NTP") set forth in the Interstate Commerce Act ("ICA") an unprecedented requirement concerning "fairness" of divisions of joint rates. Respondents do not dispute that that question is important and merits review by this Court.[2] Nor do they deny that the decision below may be read as raising that question. They merely term such a reading of the court's decision "inhospitable," and contend that in any event the court was correct in adopting its reading over that of the Commission, the expert body charged with administration of the ICA (Jt. Opp. 17). They also attempt, through strained interpretations of the court's language, to minimize the scope and impact of its decision.

First, respondents' suggestion that the court did not purport to read the Act as embodying a policy concerning "fair divisions" that the Commission must apply in granting exemptions from ICA regulation (Jt. Opp. 17) is belied by the court's own language (*see* Conrail Pet. 12, 17-19; U.S. Br. 12-13, 17-19). Respondents claim that the court below merely "intended, not to add new elements to the transportation policy, but to give relevant content to the elements already there" (Jt. Opp. 17). However, whatever may have been the court's "intent" (a largely irrelevant issue), the clear effect of its decision is to add materially and substantially to the content of the NTP that the Commission must apply in considering exemptions or taking other actions under the ICA. More importantly, respondents' description of the court's

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[2] Respondents seek to diminish the effect of the decision below by asserting that it "affirmed the core" of the Commission's exemption, *i.e.*, as to maximum rate regulation (Jt. Opp. 2). However, the court's decision nullifies the exemption as to joint rates, which even respondents acknowledge govern "most" freight movements, *e.g.*, 70% as of 1980 (Jt. Opp. 2, 3).

role—"giv[ing] relevent content" to the NTP (Jt. Opp. 17)—confirms that the court's decision is at odds with this Court's decisions holding that to be primarily the function of the Commission, not a reviewing court (Conrail Pet. 19-20, 23; U.S. Br. 24).

Respondents next contend that the "broad statements of policy" enumerated in the NTP are "particularized in" and are "anchored in and illuminated by" the various other substantive provisions of the Act, or at least the Lee Amendment and perhaps other provisions "enacted concurrently with section 10101a" in the Staggers Rail Act amendments to the ICA in 1980; on that premise they conclude that in granting an exemption the Commission must consider not only the NTP, to which the exemption provision refers, but the policies and legislative history of each such provision of the ICA (Jt. Opp. 5, 17).[3] We disagree with that position, but believe that the issue it presents—how the ICA should be construed—is one of broad and continuing importance which merits this Court's attention.

Respondents further seek to minimize the effect of the decision below treating it not as imposing substantive requirements, but as involving only procedure, *i.e.*, by saying that it merely requires the Commission to consider and explain its conclusion about the effect of the exemp-

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[3] Respondents evidently contend that only provisions of the ICA enacted as part of the Staggers Act constitute relevant particularizations of the broad policies of the NTP that must be considered, although there is nothing in the Staggers Act nor its history to support such a preferred position for its provisions in contrast to provisions enacted prior to 1980 but not repealed by the Staggers Act. To the contrary, a few provisions were singled out by Congress for special protection in section 10505 itself (*e.g.*, those prohibiting "intermodal ownership" or "protect[ing] the interests of employees" (49 U.S.C. §§ 10505(e), (g)), without regard to whether they antedated the Staggers Act.

tion on the fairness of divisions (Jt. Opp. 17, 21). However, "[decisions] relying on substantive analysis have often been cloaked in quasi-procedural language,"[4] and that is plainly so here.

In making this argument respondents attempt to avoid the irreconcilable conflict in approach between the decision below and the Fifth Circuit's decision in *American Trucking Associations* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981), primarily by asserting that Congress had specifically authorized the Commission to exempt TOFC/COFC rail service, but "made no similar determination with respect to boxcar service" (Jt. Opp. 21). This purported distinction misses the point. The relevant consideration is that the exemption at issue here involves joint rates, not that it involves boxcars, and Congress did make clear its intention that the Commission apply its exemption authority to joint rates (Conrail Pet. 7, citing 126 Cong. Rec. 28430 (1980); H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980)).

Respondents repeatedly suggest that the Commission's exemption was contrary to the judgment reached by Congress in the legislative "compromise" reflected in the Staggers Act with respect to joint rates (Jt. Opp. 4, 11-16, 20). But this contention misapprehends the nature of that compromise.

The Carter Administration broadly proposed total and unconditional deregulation of joint rates for all freight traffic, without regard to whether a carrier had market power; the Commission would have had no role to play in the regulation of joint rates and there would have been no mechanism for reimposing regulation if warranted by

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[4] Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 571 (1985).

after-the-fact review.[5] In the compromise, that approach was rejected. Instead, in section 10705a carriers were given a limited measure of new authority to take unilateral action concerning joint rates (through surcharge or cancellation), without regard to whether they have market power; the Lee amendment was a relatively narrow limitation upon the right to take such unilateral action.[6] Moreover, as we have noted (Conrail Pet. 7 n.7, 19 n.30), carriers retained their pre-Staggers Act rights to cancel joint rates under section 10705(e), which is not subject to the Lee Amendment, and under which the Commission has consistently been sanctioning cancellations where (as here) there is no market power, but only after "unnecessarily expensive and time consuming" proceedings (*see* Pet. App. 161a & n.23).[7]

In addition, Congress broadly authorized and directed the Commission to deregulate further by granting exemptions, subject to after-the-fact revocation or modification, and explicitly indicated that joint rates were a prime candidate for the exercise of the exemption authority (*see* Conrail Pet. 7). Thus, there is simply no inconsistency between the boxcar exemption and the action

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[5] *See, e.g., Hearings on the Railroad Deregulation Act of 1979 Before the Subcomm. on Surface Transportation of the Senate Comm. on Comerce, Science & Transportation*, 96th Cong., 1st Sess. 3-60, 253-54 (1979).

[6] Respondents do not dispute that the terms of the Lee Amendment itself do not address the "fairness" of divisions (*see* Conrail Pet. 19 n.30).

[7] Even if respondents' argument based on the Lee Amendment had merit, at most it would call into question the application of the exemption to section 10705a, but such a limitation on the scope of the exemption would have no meaning because even prior to the exemption that section had no practical effect (*see* Pet. App. 161a).

taken by Congress in the Staggers Act.[8] Rather, the exemption is consonant with and furthers the policy and direction of the Act.

Respondents characterize the statements in floor debate by Represenative Lee as having "unequivocally expressed the intent of the framers" of the exemption provision (Jt. Opp. 14), as having been "strongly endorsed" by Representative Madigan (*id.* at 16), and as having been treated by the Commission and the courts "as an authoritative expression of the Congressional purpose" concerning exemption of joint rates (*id.*). In fact, there is no indication that the Senate shared or was aware of those views or that the conferees endorsed them; Representative Madigan's "endorsement" was made three months before the Lee statement (126 Cong. Rec. 28430 (1980)); and, in the matters cited by respondents, the Commission and the court discussed the Lee statement only in the context of applying section 10705a, to which it directly relates. Neither even suggested that it bears on the Commission's exemption authority under section 10505.

In granting the boxcar exemption, the Commission concluded that the self interest of long haul carriers will militate against the closing of efficient routes involving short haul carriers. In attempting to support the court of appeals' conclusion that the Commission had not adequately considered the relevant policies concerning divisions in reaching that conclusion, respondents assert that

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[8] Respondents state that the exemption rests upon the same premise rejected by Congress in the Staggers Act, *i.e.*, "that continued joint rate regulation was not needed to protect smaller carriers, because the long-haul carriers 'will not act so imprudently as to drive profitable traffic away' " (Jt. Opp. 12). But rejection of a proposal, based on that premise, for broad, permanent deregulation of all joint rates without regard to the existence of market power or other limitations, is not tantamount to rejection of the premise as a basis for a more limited exemption satisfying the conditions of section 10505.

in an earlier decision the Commission had treated the issue of cancellation of joint rates at greater length and had made "contradictory findings" and reached the "opposite conclusion," citing *Traffic Protective Conditions*, 366 I.C.C. 112, 125-126 (1982), *rev'd on other grounds sub nom. Detroit T. & I. R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984) (Jt. Opp. 18-19). In fact, respondents have stood the Commission's decision in that proceeding on its head, for it is completely consistent with and was relied upon in the Commission's analysis here (*see* ICC Pet. 7 n.2 & Pet. App. 162a).[9]

II. Car Hire

Respondents also seek to minimize the importance of the question presented concerning the court of appeals' invalidation of the partial exemption as to car hire by

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[9] The issue was whether the Commission should remove certain conditions it had imposed in virtually all railroad mergers and consolidations since 1920 (the so-called "DT&I Conditions"), which regulated, *inter alia*, the relationship between the merging parties' joint rates involving other carriers and their merged single line rates. In the portion of the decision relied upon by respondents the Commission discussed two hypothetical situations (not "many" (Jt. Opp. 19)) in which railroads *might* not choose the more efficient joint line route. However, the Commission then dismissed the possibility as not being a substantial concern, concluding that "[i]n general * * * a railroad acting in an economically rational manner would be expected to favor more efficient, joint-line routes over less efficient single line-routes," and held that the two hypothetical exceptions "do not appear to support general application of the DT&I Conditions to ensure against loss of more efficient joint-line routes * * *." 366 I.C.C. at 126. The Commission's decision would have applied broadly to all carriers subject to DT&I Conditions without regard to the existence of market power or to type of commodity or movement, many of which might not qualify for exemption under the limitations of section 10505. Accordingly, the Commission's statement that "statutory protections are available to protect efficient joint-line routes" (*id.*) was in no way inconsistent with the later exemption of boxcar traffic where the conditions of section 10505 were satisfied.

stating that there is no significant dispute about the content of the applicable legal standard stated by the court (*i.e.*, "partial exemption must lead to '*decreased* regulation' "), but only as to the court's application of that standard to car hire regulation (Jt. Opp. 22). But such facile and unfounded characterization cannot obscure the importance of the issue, for the court's analytical approach threatens the viability of any partial exemption. This is so because any effort to narrow the scope of regulation, short of total exemption, can be characterized as resulting in "different," and hence "fresh" or "new," regulatory impacts or formats (Jt. Opp. 24, 25).

Respondents assert that the court's ruling is of no practical consequence in this case because of the Commission's authority to act under section 11122 concerning car hire (Jt. Opp. 22). However, they carefully qualify this contention by saying only that the Commission is free to "consider" adopting rules under section 11122 that would achieve the same result (*id.*), and they in fact contend that the Commission could not do so (*cf. id.* at 23-24); *see also* Can. Opp. 27-28).

Respondents do not dispute that the agency has discretion to determine which of its applicable statutory authorities to invoke. Instead, they seek to minimize this right by asserting that the decision below does not conflict with decisions of this Court and other courts of appeals giving great deference to the agency's decisions concerning its remedial authority, asserting that those cases did not involve a choice between two express remedial provisions (Can. Opp. 24-25 n.14; *cf.* Jt. Opp. 25). However, in *Chemical Manufacturers Association* v. *Natural Resources Defense Council, Inc.*, 53 U.S.L.W. 4193, 4197 (U.S. Feb. 27, 1985) (No. 83-1013), this Court held that when there is such a choice between two provisions there

is "a particularly persuasive case for deference to the Agency's interpretation." That conclusion applies *a fortiori* here, where the statute broadly provides that the powers of the Commission are supplementary in nature, not exclusive of one another (*see* Conrail Pet. 23).

III. Export Coal

Respondents assert that the Court should not review the court of appeals' decision in this case even if it agrees to review the same court's decision concerning the Commission's exemption as to shipment of coal for export (Jt. Opp. 25-26).[10] There are no doubt differences that could lead the Court to act one way in this case and another in that. However, the two cases do present analogous questions concerning the extent to which the Commission, in considering exemptions, must address policies or provisions of the ICA not set forth in the NTP, and in both cases the court of appeals invoked a judicially formulated notion of "fairness" to beneficiaries of existing regulation as the ground for invalidating a deregulatory exemption.[11] While the Court should grant certiorari in this case even if it does not review the export coal decision, if it does grant certiorari in the latter case it should certainly do so here.[12]

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[10] *See* petitions in *ICC* v. *Coal Exporters Ass'n*, No. 84-884, and *Norfolk & W. Ry.* v. *Coal Exporters Ass'n*, No. 84-885.

[11] In export coal the beneficiaries where primarily shippers of coal for export; here they are primarily owners or investors in boxcars seeking through concededly uneconomic regulation to protect a return no longer warranted by market demand.

[12] We note the inconsistency between the rationales of the supporters of the court of appeals' decisions in the two cases. Here, respondents contend that provisions of the ICA enacted in 1980 in the Staggers Act are protected against exemption (see p. 3 n.3, *supra*), while the respondents in that case argue that pre-1980 provisions not repealed in the Staggers Act are protected against exemption. (Brief For Respondents Coal Exporters Association and National Coal

CONCLUSION

The petitions of Conrail and the Commission for a writ of certiorari should be granted.

Respectfully submitted,

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April 1985

Association in No. 84-884, p. 19). Acceptance of both arguments would preclude any exemptions. Such a fundamental inconsistency demonstrates the dangers in going beyond the express provisions of the NTP as the criteria for exemptions and confirms the need for definitive guidance from this Court concerning the validity of the Commission's approach to its authority to grant exemptions.